NO. 47970-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

---

STATE OF WASHINGTON,

Respondent,

v.

MARKIS OVERLY
Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Helen Whitener, Judge

---

# BRIEF OF APPELLANT

---

LISE ELLNER
Attorney for Appellant

LAW OFFICES OF LISE ELLNER
Post Office Box 2711
Vashon, WA 98070
(206) 930-1090
WSBA #20955

## TABLE OF CONTENTS

**Page**


A. ASSIGNMENTS OF ERROR ..... 1

Issues Presented on Appeal ..... 1

B. STATEMENT OF THE CASE ..... 2

a. Trial Facts ..... 2

b. 3.5 Hearing ..... 7

c. Jury Instruction ..... 7

d. Request To Proceed Pro Se ..... 7

e. Forensic Psychological Evaluation ..... 9

f. Sentencing ..... 11

C. ARGUMENTS ..... 2

1. THE STATE FAILED TO PROVE THE ESSENTIAL ELEMENTS OF FELONY HARRASMENT, SPECIFICALLY THAT OVERLY MADE A TRUE THREAT OR THAT THE VICTIM'S FEAR WAS REASONABLE ..... 11

a. Standard of Review ..... 12

b. Due Process Requires the State Prove Beyond a Reasonable Doubt Each Essential Element of the Crime Charged ..... 12

c. The State Failed to Prove Little Made a True Threat ..... 14

## TABLE OF CONTENTS

**Page**


d. Fear Not Reasonable…..……..16

2. OVERLY WAS DENIED HIS RIGHT TO EFFECTIVE ASSITANCE OF COUNSEL WHEN HIS NEW ATTORNEY ABANDONED THE DIMINSHED CAPACITY DEFENSE……..……17

a. Failure to Pursue Diminished Capacity……..19

3. OVERLY WAS DENIED HIS RIGHT TO PROCEED PRO SE……25

4. THE TRIAL COURT ERRED BY IMPOSING LEGAL FINANCIAL; OBLIGATIONS ON OVERLY WHOSE INCOME COMES FORM DISABILITY PAYMENTS……30

D. CONCLUSION……..……32

## TABLE OF AUTHORITIES

**Page**

WASHINGTON CASES

*State v. Aho*,
137 Wn.2d 736, 975 P.2d 512 (1999).

S*tate v. Allen*,
176 Wn.2d 611, 294 P.3d 679 (2013).

*State v. Barker*,
75 Wn.App. 236 , 881 P.2d 1051 (1994)

*State v. Coates*,
107 Wn.2d 882, 735 P.2d 64 (1987)

*State v. Cienfuegos*,
144 Wn.2d 222, 25 P.3d 1011 (2001).

*State v. Cross*,
156 Wn.2d 580, 132 P.3d 80,
*cert. denied*, 549 U.S. 1022 (2006).

*State v. Ferrick*,
81 Wn.2d 942, 506 P.2d 860,
*cert. denied*, 414 U.S. 1094 (1973).

*State v. Grier*,
171 Wn.2d 17, 246 P.3d 1260 (2011)

*State v. Griffin*,
100 Wn.2d 417, 670 P.2d 265 (1983)

*State v. Hamilton*,
179 Wn.App. 870, 320 P.3d 142 (2014).

## TABLE OF AUTHORITIES

**Page**

WASHINGTON CASES

*State v. Harris*,
122 Wn.App. 498, 94 P.3d 379 (2004).

*State v. Hawkins*,
157 Wn.App. 739, 238 P.3d 1226 (2010),
*review denied*, 171 Wn.2d 1013 (2011).

*State v. Kilburn*,
151 Wn. 2d 36, 84 P. 3d 1215 (2004)

*State v. Kohoen*,
__Wn.App.__ (Div. I) (February 8, 2016) (733307-I)

*State v. Madsen*,
168 Wn.2d 496, 229 P.3d 714 (2010).

*State v. McFarland*,
127 Wn.2d 322, 899 P.2d 1251 (1995).

*State v. Nichols*,
161 Wn.2d 1, 162 P.3d 1122 (2007).

*State v. Montgomery*,
163 Wn.2d 577, 183 P.3d 267 (2008).

*State v. Powell*,
150 Wn. App. 139, 206 P.3d 703 (2009).

*State v. Reichenbach*,
153 Wn.2d 126, 101 P.3d 80 (2004)

*State v. Rorich*,
149 Wn.2d 647, 71 P.3d 638 (2003).

## TABLE OF AUTHORITIES

**Page**


WASHINGTON CASES

*State v. Schaler*,
169 Wn.2d, 274, 236 P.3d 858 (2010).

*State v. Sutherby*,
165 Wn.2d 870, 204 P.3d 916 (2009)

*State v. Thomas*,
109 Wn.2d 222, 743 P.2d 816 (1987).

*State v. Tilton*,
149 Wn.2d 775, 72 P.3d 735 (2003).

*State v. Washington*,
36 Wn. App. 792, 677 P.2d 786,
*review denied*, 101 Wn.2d 1015 (1984).

FEDERAL CASES

*Bose Corp. v. Consumers Union of United States, Inc.*,
466 U.S. 485, 104 S.Ct. 1949,
80 L.Ed.2d 502 (1984)

*Brewer v. Williams*,
430 U.S. 387, 97 S.Ct. 1232,
51 L.Ed.2d 424 (1977)

*Farretta v. California*,
422 U.S. 806, 95 S.Ct. 2525,
45 L.Ed.2d 562 (1975)

*Roe v. Flores–Ortega*,
528 U.S. 470, 120 S.Ct. 1029,
145 L.Ed.2d 985 (2000)

## TABLE OF AUTHORITIES

**Page**

FEDERAL CASES

*Strickland v. Washington*,
466 U.S. 668, 104 S.Ct. 2052,
80 L.Ed.2d 674 (1984);

*In re Winship*,
397 U.S. 358, 90 S.Ct. 1068,
25 L.Ed.2d 368 (1970).

STATUTES, RULES AND OTHERS

U.S. Const. Amend XIV

Washington article I, section 22

RCW 9A.46.020

RCW 9.61.260.

RCW 9.94A.777

11 Washington Pattern Jury Instructions: Criminal
18.20, at 224 (2d ed.1994).

CrR 4.7(b)

## A. ASSIGNMENTS OF ERROR

1. Mr. Overly was denied his due process right to effective assistance of counsel when counsel failed to pursue a diminished capacity defense.
2. The state failed to present proof beyond a reasonable doubt that Mr. Overly committed Felony harassment with a true threat.
3. The trial court denied Mr. Overly his right to proceed pro se without an adequate colloquy on the record.
4. The trial court abused its discretion by imposing LFO's on Mr. Overly whose income is limited to disability.

Issues Related on Appeal

1. Was Mr. Overly denied his due process right to effective assistance of counsel when counsel failed to pursue a diminished capacity defense?
2. Did the state fail to present proof beyond a reasonable doubt that Mr. Overly committed Felony harassment with a true threat?
3. Did the trial court deny Mr. Overly his right to proceed pro se after he unequivocally and intelligently made that request?

4. Did the trial court abuse its discretion by imposing LFO's on Mr. Overly whose income is limited to disability?

B. STATEMENT OF THE CASE

a. Trial Facts.

Mr. Overly was on temporary permanent disability from his job with the Veterans Administration (VA), and under the care of a psychiatrist and psychologist when this incident occurred. RP 161. Mr. Overly was not taking his medication when this incident occurred. RP 147. Mr. Overly's former attorney noted a diminished capacity defense to the charges of threatening to bomb the VA and to felony harassment towards the VA. RP 21; Supp. CP___ (Omnibus Order January 10, 2014). Inexplicably, Mr. Overly's current attorneys chose not to pursue the diminished capacity defense. RP 21-22.

Mr. Overly was charged with a bomb threat and felony harassment. CP 1-2. Mr. Overly was only convicted of the harassment charge. CP 188-200. On June 27, 2013, during a session with his psychiatrist Dr. Deborah Hickey, Mr. Overly disclosed that he had not taken his medication for a couple of weeks. RP 147. When Mr. Overly came to see Dr. Hickey, he had been on leave for eight months with a mood disorder. RP162. Dr. Hickey was investigating a diagnosis of bi-polar disorder, anxiety and

another mood disorder. RP 163.

Mr. Overly, who was on temporary disability for mental health issues, wanted to continue treatment and to obtain a letter of permanent disability. RP 145. Dr. Hickey needed additional time treating Mr. Overly to determine the extent of his disability. Dr. Hickey extended Mr. Overly's temporary disability until she had more information. RP 146. Mr. Overly became agitated and stated that there was no point in continuing treatment. RP 147.

Mr. Overly informed Dr. Hickey that he had just come from the VA where he recounted that in February 2013, a Veteran screamed at him and shook his finger at him. Mr. Overly requested that the police arrest the man, but when the police declined, Mr. Overly felt disrespected. RP 148-149. Mr. Overly indicated that he was not returning to work at the VA, but would purchase a gun when he got paid the next day to kill 20 people at the VA in" retribution". RP 150. Mr. Overly was very angry and told Dr. Hickey he wanted to embarrass the VA and to commit suicide by police. RP 151.

Despite the threat, Dr. Hickey explained that Mr. Overly felt ambivalent about returning to therapy and she did not feel the threat was sufficiently urgent to report it that same day. RP 154-156. Dr. Hickey

believed it was possible that Mr. Overly would carry out his threat but decided to try to contact Dr. Coon, Mr. Overly's psychologist and tried to make contact again with Mr. Overly. After failing to make contact with Dr. Coon and Mr. Overly, Dr. Hickey called the FBI the next day because the VA is under Federal jurisdiction. RP 154-56, 167-70, 296.

On June 27, 2013, sometime after leaving Dr. Hickey's office, Mr. Overly called the police supervisor at the VA, Mr. Freedom Hadnot. RP 183. According to Mr. Hadnot, Mr. Overly was angry, loud, and erratic. RP 183. Mr. Overly was upset about the February incident because the VA police did not arrest the man who assaulted him. RP 185-86. Mr. Overly was upset during the ten minute conversation but did not make any threats. RP 191. Mr. Overly indicated that he was going to complain to Patty Murray. RP 192.

Richard Tangen was Mr. Overly's "second line supervisor". RP 204. Mr. Overly called Mr. Tangen on June 27, 2013 as well as Mr. Hadnot. RP 203, 209, 212. According to Mr. Tangen, Mr. Overly told him he had been off his medication and was not coming back to work. RP 213, 222. Mr. Overly felt violated by the VA who had not taken action against the Veteran who assaulted him and said he was going to exercise his second amendment rights and "strap up". RP 214-15. Mr. Overly

acknowledged that no weapons were allowed at the VA but said he would be the first. RP 216.

Mr. Tangen described Mr. Overly as agitated and "talking in circles". RP 218. Mr. Overly said he had a plan on his computer. RP 217. Mr. Overly never explicitly told Mr. Tangen that he was going to buy a gun. RP 219. Mr. Tangen nonetheless asked Mr. Overly not to buy a gun. RP 230. Mr. Overly did not indicate the nature of his plan or when he might carry out his plan, but because there was threat to a Federal facility, Mr. Tangen had to take it as a serious possibility. RP 221, 230-31.

When asked if he was going to buy a gun, Mr. Overly said he was not going to buy a gun but was going to exercise his second amendment rights. RP 241.Mr Overly had always been a good employee. RP 234-35. Mr. Tangen took ½ pages of notes from the 40 min conversation but admitted that his notes were not accurate. RP 248.

Mr. Tangen called for police backup while he was on the telephone with Mr. Overly. RP 238. Mr. Overly declined the opportunity to talk to Dr. Tapp a psychiatrist. RP 238-39. Officer John Gladson and Officer Scott Sherman, VA police, responded to Mr. Tangen's office where they were able to listen to part of Mr. Overly's conversation on speaker phone. RP 256, 277, 308-09. Officer Gladson knew Mr. Overly and had never

seen him mad, but was concerned that Mr. Overly would carry out his threat to exercise his 2nd amendment rights. RP 279-80.

According to Officer Gladson, Mr. Overly did not make a specific threat against a person, but was upset with the VA police for lack of follow through and said he had a plan on his computer. RP 278, 288-89. Scott Sherman was a brand new 2 month police officer when this incident occurred. RP 318. He alone believed he heard Mr. Overly threaten to blow up the VA. RP 308. Officer Sherman described Mr. Overly as "rambling", "irate" and "calm". RP 308-09, 313.

According to officer Sherman Mr. Overly said he did not have a gun but he could get one. RP 311. Officer Sherman indicated that there is always a concern that someone will act on a threat. RP 313. Officer Sherman indicated that a lot of what Mr. Overly said did not make any sense. RP 330. Robert Deala a detective with the Fircrest Police searched Mr. Overly's home and did not find any guns or explosives and there were no plans or threats located on Mr. Overly's computer or cell phone. RP 353-56, 362-63.

Lorelei Overly Proo, Mr. Overly's sister was with Mr. Overly at Costco where Mr. Overly also worked, while he was on the telephone with

Mr. Tangen . RP 450-453. Ms. Proo never heard Mr. Overly yell or raise his voice or cause any sort of a scene. RP 449-453.

b. 3.5 Hearing.

When Mr. Overly was arrested, he was asked if he had any weapons to which he responded, he did not but he could get some. RP 387. The defense challenged the admissibility of Mr. Overly's statement that he did not have any weapons but could get some. RP 387.

c. Jury Instruction

The Defense requested WPIC 6.14 which is a limiting instructing regarding a defendant's 3.5 statements, RP 468. The trial court denied the defense request for WPIC 6.14 believing that she did not have any discretion to provide this instruction. RP 472-476.

d. Request To Proceed Pro Se

Prior to trial, Mr. Overly requested to proceed pro se. RP 133-135. The trial court denied the request informing Mr. Overly that he did not really want to proceed pro se but the just wanted personal time with his attorneys. RP 137. The trial court ordered the defense to spend time with Mr. Overly on a daily basis before or after each day of trial RP 138-139. This seemed to satisfy Mr. Overly. RP 139. After trial, but before sentencing, on May 27, 2015, Overly again requested to proceed pro se,

indicating his wish to speak for himself. RP 563. The trial court denied the request without a colloquy, stating that nothing had changed since her first ruing. RP 563-66.

For the third time, Mr. Overly again requested to proceed pro se. RP 582-87. Mr. Overly also filed a motion for a new trial. RP 588, 605. The court did not conduct a colloquy with Mr. Overly but ruled that Mr. Overly "would be an active participant in his sentencing, which therefore would mean

> counsels are then standby, if you want to call it standby counsel. But that would mean that Mr. Overly does have the right to file the documents that he's filing. Counsels have a right to review it. And since he is now also an active participant in his sentencing, I believe I can review the documents he's filing, as long as counsels get an opportunity to review it and have an opportunity to respond".

RP 584-85.

When the prosecutor asked the trial judge to engage Mr. Overly in a colloquy, the trial judge indicated that Mr. Overly is assisting but not pro se. RP 587. RP 598-91. The trial court then ordered Mr. Overly to work with DAC. RP 592-93. After the prosecutor again requested the court engage Mr. Overly in a colloquy, the court, for the first time, engaged Mr. Overly in a colloquy. RP 593-97. Thereafter, the court removed DAC, left

DAC as standby and acknowledged that the court denied Mr. Overly's prior requests to proceed pro se. RP 594.

> THE COURT: And I previously denied your request in regards to representing yourself at trial; correct?
> THE DEFENDANT: Yes, ma'am.
> THE COURT: I also previously denied your request to represent yourself at sentencing, fully represent yourself at sentencing.
> ……
> THE COURT: However, at this juncture I am removing the Department of Assigned Counsel from assisting you –
> …..
> They will be standby counsel…

RP 594-95.

e. Forensic Psychological Evaluation

> Mr. Overly's self-report Mr. Overly denied a history of psychiatric hospitalization, and stated "I don't know" when asked if he has ever been diagnosed with a mental health condition. Mr.
> Overly was taking Pax11 (anxiety / depress10n) and R1spendone (mood / psychosis). He endorsed a history of taking Venlafaxine (depression / anxiety), Ab1lify (depression / mood / psychosis), Celexa (depression), Clonazepam (anxiety), Teniazepam (insomnia / anxiety), and Citalopram.
>
> Mr. Overly endorsed confus10n and d1sonentallon after being prescribed Citalopram m 2011 He reported finding himself standing at the edge of a cliff, outside of his running car, hearing the song "Wish You Were Here" playing on his car stereo, and watching the exhaust from his car.
> Mr. Overly reported not being sure if he was smc1dal or

not, though he went to the Emergency Department at St. Joseph's where he contracted for his safety with his provider and a treatment provider at St. Josephs. He denied other history of dangerousness toward self or others, a history of abuse, a family history of mental illness, seizure / seizure disorder, and violation of conditions

Mr. Overly described a history of cocaine and methamphetamine use consistent with Substance Dependence; he also endorsed possess10n charges for one or both Mr. Overly endorsed use not amounting to Abuse or Dependence to alcohol, cannabis, psychedelic mushrooms, and LSD

Mental Health Division (MHD) records: Mr. Overly had 8 contacts with the Pierce Regional Support Network (RSN) between 09/11/98 and 09/15/11 . Mr. Overly was diagnosed as having an "Acute Stress Reaction," which would be individual of Posttraumat1c Stress and not a primary psychotic or cognitive disorder.

Western State Hospital (WSH) records Mr. Overly was hospitalized from 09/12/98 to 09/14/98 for Cocaine Abuse He processed the substance and was discharged m under two days. His provisional diagnostic 1mpress1ons were "C9caine Withdrawal, History of Polysubstance Abuse, Cocaine Dependence, Rule Out Underlying Bipolar Disorder with Mania." Mr. Overly had never been evaluated by Western State Hospital.

Pierce County mental health records 06/28/13 ". presented with direct and intense eye contact, manner was cooperative, concentration was highly d1stracttble, and hygiene/grooming were WNL. I/M's thought processes were disorganized, content was goal/future oriented, mildly delusional, mildly paranoid, and conveyed persecutory themes. 1/M denied AH/VH, speech pattern was tangential, rate was extremely pressured, insight/judgment were pressured, affect was anx10us, mood was inappropriately elevated, and he was

> unable to divulge how his recently [sic] eating and sleeping had been . ." 06/29/1 3 "...affect was mildly

Supp. CP___(Forensic Psychological Evaluation October 31, 2013).

f. Sentencing

Mr. Overly informed the court that he was retired on disability. RP 619. Nonetheless, the court imposed mandatory LFO's of $800: $500 for the victims; $100 for DNA; and $200 for criminal filing fees. RP 619, 631-32. The prosecutor requested a mental health evaluation as part of the Judgment and Sentence, but the judge declined determining on her own without professional expert advice, that Mr. Overly did not have mental health issues, but had anger management issues. RP 619-21. The motion for an order of indigency indicated no source of income. (Supp. CP__ (Motion, Affidavit and Order of Indigency August 21, 2015) The trial court also denied the motion for a new trial ruling that it was untimely. RP 622.

This timely appeal follows. CP 176.

C. ARGUMENT

1. THE STATE FAILED TO PROVE THE ESSENTIAL ELEMENTS OF FELONY HARRASMENT, SPECIFICALLY THAT OVERLY MADE A TRUE THREAT OR THAT THE VICTIM'S FEAR WAS REASONABLE.

a. Standard of Review

Constitutional questions are reviewed de novo. *State v. Schaler*, 169 Wn.2d, 274, 282, 236 P.3d 858 (2010). The reviewing court conducts an independent review of the record in First Amendment cases " ' so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.' " *State v. Kilburn*, 151 Wn. 2d 36, 49– 50, 84 P. 3d 1215 (2004) (quoting *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 508, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984)).

b. Due Process Requires the State Prove Beyond a Reasonable Doubt Each Essential Element of the Crime Charged.

The due process clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Evidence is sufficient to support a conviction, if viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Montgomery*, 163 Wn.2d 577, 586, 183 P.3d 267 (2008).

In this case, to prove harassment of a public official under RCW 9A.46.020(1) and (2)(b)(iii) and (iv), the state was required to prove beyond a reasonable doubt:

> (1) A person is guilty of harassment if:
>
> (a) Without lawful authority, the person **knowingly** threatens:
>
> (i) To cause bodily injury immediately or in the future to the person threatened or to any other person; or
>
> (ii) To cause physical damage to the property of a person other than the actor; or
>
> (iii) To subject the person threatened or any other person to physical confinement or restraint; or
>
> (iv) Maliciously to do any other act which is intended to substantially harm the person threatened or another with respect to his or her physical or mental health or safety; and
>
> (b) The person by words or conduct **places the person threatened in reasonable fear that the threat will be carried out.** "Words or conduct" includes, in addition to any other form of communication or conduct, the sending of an electronic communication.
>
> ....
>
> (2)(b) A person who harasses another is guilty of a class C felony if any of the following apply..... (iii) the person harasses a criminal justice participant who is

> performing his or her official duties at the time the threat is made; or (iv) the person harasses a criminal justice participant because of an action taken or decision made by the criminal justice participant during the performance of his or her official duties. For the purposes of (b)(iii) and (iv) of this subsection, **the fear from the threat must be a fear that a reasonable criminal justice participant would have under all the circumstances**. Threatening words do not constitute harassment if it is apparent to the criminal justice participant that the person does not have the present and future ability to carry out the threat.

Id. (Emphasis added).

c. The State Failed to Prove Little Made a True Threat.

In this case, the state failed to prove that Overly made a true threat against Hadnot or Tangen. " To avoid violating the First Amendment, a statute criminalizing threatening language must be construed "as proscribing only unprotected true threats." S*tate v. Allen,* 176 Wn.2d 611, 626, 294 P.3d 679 (2013). A true threat is "'a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted ... as a serious expression of intention to inflict bodily harm upon or to take the life' of another person." *Kilburn,* 151 Wn. 2d at 43.

Even if couched in the language of threats, communications are not

true threats if they are in fact "merely jokes, idle talk, or hyperbole." *Schaler*, 169 Wn.2d at 283. Words alone do not constitute malicious harassment "unless the context or circumstances surrounding the words indicate the words are a threat." RCW 9A.36.080(1)(c).

In *State v. Kohoen*, ___Wn.App.____ (Div. I) (February 8, 2016) (733307-I), the defendant an eight grade was suspended from school two years before the tweets by the same person (SG) the defendant sent the tweets to two years later. The threats were as follows: SG must die" and "I still want to punch you in the throat". The defendant was charged and convicted of cyberstalking under RCW 9.61.260. The court held that these were not true threats because a reasonable person in JK's position would not have foreseen that her tweets would be interpreted as serious threats to inflict harm on SG. Instead, the tweets were intended and received as "hyperbolic expressions of frustration."

The facts of this case are different but similar in that the parties were familiar to each other and both were frustrated by past injustices. Tangen, the police and the doctors were aware of Overly's significant mental health issues, that he was off his medications, and that he was extremely frustrated. RP 209-214, 224, 278, 288-89. Overly like the defendant in *Kohoen*, was known to the victims. Overly had a reputation

for being a good worker who did not make trouble, but had recently been upset and frustrated at having been mistreated by patients at the VA and ignored by the police. RP 183-84, 214, 218.

Overly ranted and raved in his doctor's office and did the same on the telephone with Tangen. Id. Tangen knew that Overly did not own a gun. RP 215, 219, 221, 234-35. As Dr. Hickey described, when Overly was "ranting", he was clearly venting his frustration and was being and somewhat grandiose. RP 218-19, 239-40. This behavior like that in *Kohoen*, were not true threats but "hyperbolic expressions of frustration." *Kohoen, supra*. The state failed t prove that Mr. Overly made a true threat.

d. Fear Not Reasonable.

When Overly threatened to "strap up", Tangen testified that he had no choice but to take the matter seriously, but this does not mean that he believed Overly would carry out his threat and this does not establish that Overly made the threat knowing Tangen would take him seriously. RP 221, 241, 313. Officer Gladson testified that Overly never made a threat to harm a specific person. RP 288-89.

Tangen knew Overly was talking in circles, upset and frustrated, and also knew that Overly was not a violent person. RP 234-330. Under

the circumstances, an experienced law enforcement officer would not have reasonably feared that Overly would cause him any harm. Reviewing the evidence in the light most favorable to the state, the state failed to prove that Overly made a true threat or that Tangen's fear was reasonable under the circumstances. The remedy here for failing to prove the essential elements of a crime is remand for reversal with prejudice. *Montgomery*, 163 Wn.2d at 586.

2. OVERLY WAS DENIED HIS RIGHT TO EFFECTIVE ASSITANCE OF COUNSEL WHEN HIS NEW ATTORNEY ABANDONED THE DIMINSHED CAPACITY DEFENSE.

The purpose of the requirement of effective assistance of counsel is to ensure a fair and impartial trial. *State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). The standard of review for a challenge to the effective assistance of counsel is de novo. *State v. Cross*, 156 Wn.2d 580, 605, 132 P.3d 80, *cert. denied*, 549 U.S. 1022 (2006). A defendant has an absolute right to effective assistance of counsel in criminal proceedings. *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011); *Strickland v. Washington*, 466 U.S. 668, 684–86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Sixth Amendment to the U.S. Constitution and Washington article I, section 22.

While counsel is presumed effective, this presumption is overcome

where the defendant establishes that (1) defense counsel's representation was deficient, falling below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defendant. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

More than the mere presence of an attorney is required. *State v. Hawkins*, 157 Wn.App. 739, 747, 238 P.3d 1226 (2010), *review denied*, 171 Wn.2d 1013 (2011). A deficient performance claim can be based on a strategy or tactic when the defendant rebuts the presumption of reasonable performance by demonstrating that "there is no conceivable legitimate tactic explaining counsel's performance." *Grier*, 171 Wn.2d at 33; citing, *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho*, 137 Wn.2d 736, 745–46, 975 P.2d 512 (1999).

Trial strategies and tactics are thus **not** immune from attack on grounds of ineffective assistance of counsel. "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores–Ortega*, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

Prejudice is established if the defendant can show that "there is a

reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different." *State v. Nichols*, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). "The remedy for lawyer's ineffective assistance is to put defendant in position in which he would have been had counsel been effective." *State v. Hamilton*, 179 Wn.App. 870, 879, 320 P.3d 142 (2014). In this case, the failure to raise a diminished capacity defense constitutes ineffective assistance of counsel. *State v. Tilton*, 149 Wn.2d 775, 784, 72 P.3d 735 (2003).

a. Failure to Pursue Diminished Capacity.

The Washington Pattern Jury Instruction on diminished capacity states: "Evidence of mental illness or disorder may be taken into consideration in determining whether the defendant had the capacity to form ---- (fill in requisite mental state)." 11 Washington Pattern Jury Instructions: Criminal 18.20, at 224 (2d ed.1994). Diminished capacity is a mental condition not amounting to insanity which prevents the defendant from forming the necessary mental state to satisfy the elements of the crime charged. *State v. Harris*, 122 Wn.App. 498, 506, 94 P.3d 379 (2004). Importantly, this defense must be declared pretrial. Id. (citing CrR 4.7(b)(1), (b)(2)(xiv)).

Although the failure to request a diminished capacity instruction is not ineffective assistance of counsel per se, it is ineffective assistance when it is not based on sound trial strategy. *State v. Cienfuegos*, 144 Wn.2d 222, 229, 25 P.3d 1011 (2001). In determining whether counsel's failure to request such an instruction constituted ineffective assistance of counsel, the court proceeds through a three-step analysis:

> First, we must determine whether [the defendant] was entitled to a diminished capacity instruction. Second, we must decide whether it was ineffective assistance of counsel per se not to have requested the instruction. Finally, we must decide whether ineffective assistance of counsel prejudiced his defense under the *Strickland* standard.

Id. at 227.

A defendant is entitled to a jury instruction supporting his theory of the case when there is substantial evidence in the record supporting his theory. *State v. Washington*, 36 Wn. App. 792, 793, 677 P.2d 786, *review denied*, 101 Wn.2d 1015 (1984).

In the context of an ineffective assistance of counsel claim, defense counsel is ineffective when she fails to request an instruction on the defense theory of the case that the court would have given. *State v. Powell*, 150 Wn. App. 139, 154, 206 P.3d 703 (2009).

For a trial court to give a jury instruction on diminished capacity "there must be substantial evidence of such a condition, [and] the evidence must logically and reasonably connect the defendant's alleged mental condition with the asserted inability to form the required specific intent." *State v. Griffin*, 100 Wn.2d 417, 418, 670 P.2d 265 (1983) quoting *State v. Ferrick*, 81 Wn.2d 942, 944-45, 506 P.2d 860, *cert. denied*, 414 U.S. 1094 (1973).

For a diminished capacity defense to be successful, the defendant must show that his diminished capacity negated the mens rea required for the offense. *Thomas*, 109 Wn.2d at 227; *State v. Coates*, 107 Wn.2d 882, 889, 735 P.2d 64 (1987) (using intoxication as an example of diminished capacity).

In *Thomas* the petitioner claimed she was denied effective assistance of counsel because her assigned trial counsel failed to competently present a diminished capacity defense based on voluntary intoxication to a charge of attempting to elude a police vehicle. *Thomas*, 109 Wn.2d at 223. The Supreme Court concluded that "defense counsel's representation fell below an objective standard of reasonableness." *Thomas*, 109 Wn.2d at 227-29, 232; *citing, Strickland*, at 688, 104 S.Ct. at 2065,

The Court in *Thomas* held that petitioner was prejudiced because "[a] reasonably competent attorney would have been sufficiently aware of relevant legal principles to enable him or her to propose an instruction based on pertinent cases." *Thomas*, 109 Wn.2d at 229.

In *Tilton*, the State Supreme Court held that despite a limited record, counsel was ineffective for failing to raise a diminished capacity defense where there was evidence that Tilton smoked marijuana and could not remember the incident. Id. The Court acknowledged that the "[f]ailure of the defense counsel to present a diminished capacity defense where the facts support such a defense has been held to satisfy both prongs of the *Strickland* test." *Tilton*, citing, *Thomas*, 109 Wn.2d at 226-29. 1

In Overly's case, pretrial, without explanation, defense counsel stated that he was abandoning prior counsel's diminished capacity defense. RP 21-22, 66-67, 71. Notwithstanding counsel's position, the court nonetheless explained that Overly's treatment at the V.A. was a relevant issue in the case. RP 32-33. Overly's counsel moved to suppress his statements to his doctor about not taking his medication, arguing the communication was privileged. RP 63. Defense counsel did not call any of

---

1 The Court in *Tilton*, reversed on other grounds because the record was insufficient as reconstructed.

Overly's doctors as expert witnesses, even though Overly made threats during his visit to his psychiatrist who was treating Overly for anxiety issues, mood disorder issues, PTSD, and possible bi-polar disorder. RP 70, 76, 112 ,123-24; Supp. CP (Forensic Evaluation October 28, 2013)(October 31, 2013).

Counsel further acknowledged that Overly sought treatment for mental health issues, and made threats during therapy as part of the therapeutic process because he was "suffering from some mental health maladies that cause his moods – his emotions to be affected by that." RP 122-23. The record reveals that Overly had been hospitalized at Western State, and was evaluated for competency to stand trial in this matter. Supp. CP. (Forensic Evaluation October 28, 2013)(October 31, 2013). The evaluator Dr. Les Hutchins noted a significant history of mental health issues. Id.

The mental health issues in this case were not subtle, and the original defense attorney noted diminished capacity as a defense, provided the state with Exhibit 113, the deposition of Dr. Hickey. Counsel's failure to purse a diminished capacity defense some two years later is inexplicable. RP 122-23, 127; Exhibit 13. There is nothing in the record to indicate reasonable grounds for counsel not to pursue this defense in

this case because a diminished capacity defense would have negated the mens rea "knowingly".

> The relevant elements of the Felony Harassment statute are:
>
> 1) A person is guilty of harassment if:
> "(a) Without lawful authority, the person *knowingly* threatens:
> "(i) To cause bodily injury immediately or in the future to the person threatened or to any other person; [and]
> "....
> (b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out....
> "....

RCW 9A.46.020 (emphasis added).

Overly received ineffective assistance of counsel because his trial counsel failed to pursue a diminished capacity defense, failed to investigate his mental health condition at the time of the alleged crimes, and failed to request a diminished capacity instruction. The state presented evidence that Overly was under the care of a psychiatrist and psychologist and that he was not on his medication when this incident occurred. RP 147-54. With this information, a competent attorney would have raised diminished capacity as a defense because there was substantial evidence of a mental health condition that logically and reasonably connected Overly's mental condition with his ability to formulate the mens rea knowingly.

If counsel had pursued a diminished capacity defense, the court would have given the instruction based on ample evidence in the record connecting mental illness to the incident, which would have provided Overly the opportunity to argue that his mental state negated the mens rea, "knowingly" in the harassment charge. *Thomas*, 109 Wn.2d at 227; *Coates*, 107 Wn.2d at 889 (using intoxication as an example of diminished capacity).

Overly was prejudiced because: counsel aware of the mental health issues; the case demanded such an instruction based on the fac; no reasonable attorney would have failed to pursue this defense that was proposed by original counsel; the defense would have negated the mens rea "knowingly", and provided the jury with grounds to find Overly not guilty on this basis. *Thomas*, 109 Wn.2d at 228. As in *Thomas*, and recognized in *Tilton*, defense counsel's failure to raise the diminished capacity deficient was deficient to Overly's prejudice. *Tilton*, 149 Wn.2d at 784.

For this reason, Overly's conviction should be reversed and the matter remanded for a new trial.

3. OVERLY WAS DENIED HIS RIGHT TO PROCEED PRO SE.

Defendants in a criminal case have an explicit right to self-representation under the Washington Constitution and an implicit right under the Sixth Amendment to the United States Constitution. WASH CONST. art. 1 section 22 ("the accused shall have the right to appear and defend in person"); *Farretta v. California*, 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); *State v. Madsen*, 168 Wn.2d 496, 229 P.3d 714 (2010).

This right is afforded despite the difficulty it can wreak on both the defendant and the administration of justice. *Farretta*, 422 U.S. at 83; *Madsen*, 168 Wn.2d at 503. Notwithstanding this explicit right, the United States Supreme Court and our State Supreme Court have held that courts are required to indulge in "'every reasonable presumption' against a defendant's waiver of his or her right to counsel." *Brewer v. Williams*, 430 U.S. 3887, 404, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977) "The unjustified denial of this [pro se] right *requires* reversal." *Madsen*, 168 Wn.2d at 503 (quoting, State v. Stenson, 132 Wn.2d 668, 737, 940 P.2d 1239 (1997) (emphasis added).

This Court reviews a denial of a request to proceed pro se for abuse of discretion. *Madsen*, 168 Wn.2d at 504. Discretion is abused if a

decision is manifestly unreasonable or "rests on facts unsupported in the record or was reached by applying the wrong legal standard." *State v. Rorich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

In *Madsen*, the defendant made three unequivocal requests to proceed over a five month period. *Madsen*, 168 Wn.2d at 501.The court deferred ruling on the first request where Madsen explained that he thought he could resolve the matter himself. Id. During the second request, Madsen expressed his constitutional right to represent himself. *Madsen*, 168 Wn.2d at 501-02. The court again deferred ruling on the request. Id. For a third time, Madsen renewed his request to proceed pro se. *Madsen*, 168 Wn.2d at 502. The court denied the request stating that it did not believe that Madsen was prepared to handle a trial and he was disruptive. *Madsen*, 168 Wn.2d at 502-03.

A court may not deny a request to proceed pro se unless the "defendant's request is equivocal, untimely, involuntary, or made without a general understanding of the consequences." *Madsen*, 168 Wn.2d at 5 04-05. Once the court determines that the request is unequivocal and timely, the court must then determine if the defendant's request is voluntary, knowing, and intelligent, usually by colloquy. Id. To support a denial, the court must point to "some identifiable fact". Id.

A motion to proceed pro se is timely:

> If the demand for self-representation is made (1) *well before the trial or hearing and unaccompanied by a motion for a continuance, the right of self-representation exists as a matter of law;* (2) as the trial or hearing is about to commence, or shortly before, the existence of the right depends on the facts of the particular case with a measure of discretion reposing in the trial court in the matter; and (3) during the trial or hearing, the right to proceed pro se rests largely in the informed discretion of the trial court.

*Madsen*, 168 Wn.2d at 508 (quoting, *State v. Barker*, 75 Wn.App. 236 , 241, 881 P.2d 1051 (1994) (emphasis added).

The State Supreme Court held that when the trial court does not rule on a defendant's initial request to proceed pro se but defers the ruling, the issue of timeliness must be examined from the first request. *Madsen*, 168 Wn.2d at 508. Moreover, a court's concern with a defendant's ability to proceed pro se or his competency are not grounds to defer or deny a request to proceed pro se. *Madsen*, 168 Wn.2d at 508-10. "A court may not deny pro se status merely because the defendant is unfamiliar with legal rules or because the defendant is obnoxious. Courts must not sacrifice constitutional rights on the altar of efficiency." *Madsen*, 168 Wn.2d at 509.

Here, prior to trial, Overly like Madsen made his first request to proceed pro se. RP 133-35. Overly informed the court that he had represented himself in a different trial and won. RP 133-34. The court interpreted Overly's request as a request to obtain more time with his attorneys. RP 137. After trial, but before sentencing, on May 27, 2015, Overly again requested to proceed pro se, indicating his wish to speak for himself. RP 563. Overly's attorney asked the court to conduct a colloquy which did not occur. Id. The court simply denied the request to proceed pro se. RP 566.

Again on July 17, 2015, for the third time, Overly requested to proceed pro se. RP 581, 605. Overly told the court he was no longer interested in his attorneys' opinions, they no longer represented him and he wanted to represent himself. RP 582. Defense counsel affirmed that Overly did not want their representation, but requested to assist Overly. RP 582-83. Overly rejected any notion of assistance, explaining again that he had previously represented himself and prevailed, he was educated and knew how to proceed. RP 584.

The court denied the motion ruling that nothing had changed since Overly's prior requests to proceed pro se, but indicated that Overly could actively assist. RP 584-87. After Overly's third request to proceed pro se,

the court recognized that throughout the trial, Overly made clear requests to proceed pro se which the court denied. RP 598-91.

Concerned with this Court's review, the prosecutor repeatedly asked the trial court to engage Overly in a colloquy to make a better record. RP 587. The court engaged in a colloquy, informed Overly that he could choose to represent himself, removed DAC, and then required Ovelry to work with DAC. RP 589-93.

The court did not articulate her reasons for denying the second request to proceed pro se, and although she told Overly that she was removing DAC, in the same breath she ordered Overly to work with DAC. 593. It is unnecessary to speculate as to the court's reasons for denying the request because there is nothing in the record to justify the court's denial of Overly's unequivocal, intelligent exercise of his constitutional right to proceed pro se. *Farrett*a, 422 U.S. at 83; *Madsen*, 168 Wn.2d at 503-05.

This Court must remand for reversal of the conviction and a new trial.

5. THE TRIAL COURT ERRED BY IMPOSING LEGAL FINANCIAL; OBLIGATIONS ON OVERLY WHOSE INCOME COMES FORM DISABILITY PAYMENTS.

The trial court erroneously imposed a $100 dollar DNA fee and a $200 criminal filing fee in Overly's judgment and sentence. RP 619, 631-32. Under RCW 9.94A.777, the trial court may not impose a DNA fee or a criminal filing fee without first determining the defendant's ability to pay. Id. The trial court erroneously believed that she did not have any discretion over these fees and further, *sua sponte* decided that notwithstanding Overly's sole source of income coming from disability, he did not suffer from mental health issues. RP 145, 166, 619-20.

RCW 9.94A.777 provides:

> (1) Before imposing any legal financial obligations upon a defendant who suffers from a mental health condition, other than restitution or the victim penalty assessment under RCW 7.68.035, a judge must first determine that the defendant, under the terms of this section, has the means to pay such additional sums.
> (2) For the purposes of this section, a defendant suffers from a mental health condition when the defendant has been diagnosed with a mental disorder that prevents the defendant from participating in gainful employment, as evidenced by a determination of mental disability as the basis for the defendant's enrollment in a public assistance program, a record of involuntary hospitalization, or by competent expert evaluation.

Id.

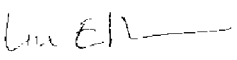
The order of indiceny indicate no source of income but Overly informed the court that he was on disability. RP 619; (Supp. CP__ (Motion, Affidavit and Order of Indigency August 21, 2015). Accordingly, before imposing court costs and a DNA fee, the court was required to first determine Overly's ability to pay. Id. The trial court's failure to inquire and her failure to understand this statue require remand for resentencing without the $300 in impermissible LFO's.

D. CONCLUSION

Markus Overly respectfully requests this Court reverse his conviction and dismiss with prejudice based on insufficient evidence, or in the alternative, remand for a new trial and for a new sentencing removing he LFO's.

DATED this 14th day of March 2016.

Respectfully submitted,



LISE ELLNER
WSBA No. 20955
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County Prosecutor's Office pcpatcecf@co.pierce.wa.us and

Marcus Overly 2122 MacArthur St W University Place, WA 98446
true copy of the document to which this certificate is affixed, on March 14, 2016. Service was made electronically.

_____Signature

# ELLNER LAW OFFICE

## March 14, 2016 - 4:05 PM

**Transmittal Letter**

Document Uploaded: 7-479702-Appellant's Brief.pdf

Case Name: State v. Overly
Court of Appeals Case Number: 47970-2

**Is this a Personal Restraint Petition?** Yes ■ No

## The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

**Comments:**

No Comments were entered.

Sender Name: Lise Ellner - Email: liseellnerlaw@comcast.net

A copy of this document has been emailed to the following addresses:

pcpatcecf@co.pierce.wa.us